U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 03 216 50106 Office: VERMONT SERVICE CENTER Date: AUG 31 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research fellow at the University of Pennsylvania. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Seven witness letters accompany the petitioner's initial submission. Two of the witnesses are on the faculty of the University of Alaska, Fairbanks, where the petitioner earned his doctorate. Four of the witnesses are on the faculty of the University of Pennsylvania, where the petitioner has worked since 2002. The remaining witness works at a different university, but has been collaborating with the petitioner.

Professor Howard Goldfine has supervised the petitioner's postdoctoral work at the University of Pennsylvania. He states:

> During the past year [the petitioner] has made considerable progress in two important projects related to bacterial pathogenesis. . . . Currently he is doing what I believe is ground-breaking research on the pathogenesis of anthrax. In this work he is exploring the possibility that two proteins secreted by the anthrax bacillus function in an early stage of inhalation anthrax in which these bacteria avoid being destroyed by macrophages, the body's first line of defense. . . . In my opinion . . . it is of crucial importance to the projects that [the petitioner] be permitted to maintain continuity through their completion.

Prof. Goldfine does not indicate how much time is needed to bring the projects to completion, nor does he explain why the petitioner's existing nonimmigrant status would not permit him to complete the project.

Professor Akira Kaji offers further details about the petitioner's work at the University of Pennsylvania:

> [The petitioner's] research focuses on a virulent gene *plc*A which encodes an enzyme called . . . PI-PLC [which] plays a very important role both in the bacterial escape from the primary endosomes and in its escape from two-membrane vacuoles during the later process of cell-to-cell spread. His project concentrates on the functions of PI-PLC in cell biology of infection at the early stage and at the later stage of cell-to-cell spread. [The petitioner] has made a great progress in our understanding of this virulent factor in the pathogen's cell-to-cell spread . . . [and his findings] could provide a new way of treatment to inhibit the rapid infection caused by *Listeria monocytogenes*.
>
> [The petitioner's] another extremely important line of research [sic] is to evaluate the essential functions of PI-PLC from *Bacillus anthracis*, a human pathogen that causes anthrax. He has made a major progress in this direction by constructing several mutants using

> molecular cloning. . . . [T]he understanding of PI-PLC's role in blocking the infection by *Bacillus anthracis* . . . could provide a useful tool to fight potential bioterrorism.

Several other witnesses offer more generic statements regarding the importance of researching the above-named pathogens, and expressing confidence in the petitioner's ability to perform such research.

The director denied the petition, stating that the record lacks evidence to show that the petitioner "has had such a substantial impact on the field" that his work is "known outside the circle of his personal acquaintances." The director noted the lack of evidence that other researchers have cited the petitioner's published work.

On appeal, counsel states "in the area of Microbiology research, a research project takes a long cycle from project initiating to publishing results in journals. . . . There might well be other researchers, who would plan to cite [the petitioner's] work. . . . And their papers might just not be published yet." The assertion that other researchers *might* plan to cite the petitioner's work is, on its face, unsupported speculation. We note that the record contains published articles by the petitioner, in which the petitioner cites articles published the same year. For instance, an article submitted for publication in November 1998 contains several references to other articles published in 1998. The petitioner has been producing published work since 1991, and thus there has been ample time for other researchers to cite the petitioner's published work. Thus, the record not only fails to support, but outright refutes, counsel's attempt to blame an alleged long turnaround time for the lack of citations of the petitioner's work, and counsel's credibility necessarily suffers as a result.

The petitioner submits, on appeal, more recent examples of his work, as well as new letters. Three of the six new letters are from current or former University of Pennsylvania faculty members; a fourth is one of the petitioner's collaborators.

The remaining two witnesses indicate that they became aware of the petitioner's work in 2004. Dr. [redacted] of Cornell University states that the petitioner "presented the most recent results from his work" at a conference in New Orleans. Dr [redacted] of the Seattle Biomedical Research Institute states that she "became interested in [the petitioner's] research work" after seeing the petitioner's presentations in New Orleans and in Uppsala, Sweden. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date based on new facts that did not obtain at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The petitioner's 2004 conference presentations cannot show that the petition was already approvable in July 2003 when the petition was filed.

The new materials submitted on appeal demonstrate that the petitioner is a skilled and increasingly prolific researcher, and that Dr. [redacted] considers him to be an important member of his laboratory. At the same time, however, the record does not show that the petitioner had had any significant impact on his field at a national level as of the petition's filing date. Also, many of the arguments offered revolve around the petitioner's short-term involvement on various research projects, in which he is employed as a postdoctoral researcher. An alien's H-1B nonimmigrant status can be extended to up to six years in length, which is considerably longer than the typical duration of a postdoctoral appointment (which, in turn, is typically viewed as a temporary training assignment). We do not construe the national interest waiver as simply a means to facilitate the prolonging of an alien's postdoctoral training.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest

waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.